

# **Background Checks by Texas Cities: When Are They Permissible?**

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## **Introduction**

Considering the record of some of the heroes of the Alamo, Goliad, and San Jacinto, Texas might still belong to Mexico if background checks like those used today had been available in 1836 and were used to screen candidates to fight in the Texas Revolution. In fact, many of the secrets in the closets of applicants for city jobs are much less startling than those of Jim Bowie (slave trading, smuggling, dueling), William Travis (infidelity, debt dodging, abandonment of wife and child, STDs), Sam Houston (felonious assault, alcoholism), James Fannin (slaver, expelled from West Point, disobedience of orders) and David Crockett (lying about how old he was when he killed his first bear).

Mercifully, those heroic Texians took care of pesky issues like gaining independence so that those of us with startling secrets in our closets (e.g. once wore plaids and stripes simultaneously) do not have to worry about being refused the opportunity to fight in a revolution. We just may not get the city job we want.

In a more serious vein, city employers conduct background checks for two basic reasons: they need to hire employees they can trust and they do not want to be found negligent in hiring someone with a history of criminal activity who subsequently causes injury or damage that might have been avoided had there been a background check. For certain jobs a background check is required by law, and occasionally a city may need to conduct one for a non-employment purpose.

The purpose of this paper is to provide a basic primer for when and how a city may conduct a background check, what laws apply, and what a city should do to avoid mistakes that might lead to either liability, litigation, or penalties.

## **What kind of background checks are common?**

Criminal, arrest, incarceration, and sex offender records:

Criminal background information is available from a variety of sources, from DPS, statewide court and corrections records to law enforcement records that stem from county or metro law enforcement offices, as well as database-type criminal searches of statewide and national crime file repositories, some of which are available only to law enforcement agencies.

Citizenship, immigration, or legal working status:

Employers with more than four employees are required to verify that all employees hired

are eligible to work in the United States by the Immigration Reform and Control Act (IRCA). Federal immigration law prohibits employers from imposing citizenship requirements on job applicants or from giving preference to United States citizens. Thus, employers who request employment verification only for individuals of a particular national origin or individuals who appear to be or sound foreign may violate both Title VII's prohibition against national origin discrimination as well as the IRCA, for failing to request employment verification from all employees and/or giving preference to United States citizens.

The hiring of undocumented workers is an issue for Texas and American businesses, particularly since the forming of the Department of Homeland Security and its Immigrations and Customs Enforcement (ICE) division. "Immigration raids" have forced employers to consider including legal working status as part of their background screening process. All employers are required to keep government Form I-9 documents on all employees and some states mandate the use of the federal E-Verify program to research the working status of Social Security numbers. Some jobs are only available to citizens who are residents of that country due to security concerns.

National origin discrimination includes discrimination against an individual because of the nationality of an ancestor. It also includes practices that disparately impact people of a particular nationality, such as policies restricting the speaking of foreign languages at the workplace or differential treatment of job applicants with respect to checking immigration status.

#### Driving and vehicle records:

Cities often hire drivers and are concerned about clean driving records, so that Department of Public Safety and/or Department of Transportation records are searched to determine a qualified driver.

#### Drug tests:

Drug tests are used for a variety of reasons—ethics, measuring potential employee performance, and keeping workers' compensation premiums down. Although in the category of background checks, drug tests deserve separate consideration and are not discussed in any detail in this paper.

#### Education records:

These are used to confirm that a potential employee has graduated from high school (or received a GED) or obtained a college degree, graduate degree, or some other accredited university degree. SAT scores are sometimes requested by employers.

#### Employment records:

These range from confirmation of past employment to discussions about performance, activities, reasons for leaving, accomplishments, and relations with others. To some extent an employer is dependent on information supplied by an applicant, but long periods of non-employment on a job application might be camouflage for a job that did not end well for the applicant.

Financial information:

Credit history, liens, civil judgments, bankruptcy, and tax information are often included in a background report, but can be the area where an employer is most likely to make a mistake.

Licensing records:

Cities often require particular types of licenses, certifications, and registrations, depending on the job under consideration, and those records often include personal information, education, complaints, investigations, and disciplinary actions.

Litigation records:

A City may be wise to identify potential employees who routinely file frivolous or fraudulent discrimination, whistleblower, or wrongful termination lawsuits.

Medical, Mental, and Physiological evaluation and records:

While relevant to most employment, these records are generally not available to consumer reporting agencies, background screening firms, or any other investigators without documented, written consent of the applicant or employee.

Military records:

Employers often request the specifics of applicants' military discharge.

Polygraph testing:

Although not common in connection with city employment other than law enforcement, persons seeking employment in a governmental position related to national security, safety, or facility security are sometimes asked to take a "lie detector test," and those who fail a polygraph test may not be selected. The questionable reliability of such tests and potential for misuse makes polygraph testing for most job applicants ill-advised.

Social Security Number:

A fraudulent SSN may be indicative of identity theft, insufficient citizenship, or concealment of a "past life." Background screening firms usually perform a Social Security trace to determine where an applicant or employee has lived.

Tenant Background Checks:

Some cities rent property to businesses or individuals and want to learn the experiences of previous landlords of the applicant.

Other interpersonal interviews:

Employers sometimes investigate past employment to verify position and salary information, interview persons who worked with or knew the applicant, such as teachers, friends, coworkers, neighbors, and family members. However, the hearsay nature of such investigations can expose companies and even the person being interviewed to lawsuits.

**What is covered by a background check?**

The general rule for criminal background checks for non-city employers is that an employer may go back only seven years in a criminal background check, with certain exceptions depending on the amount of salary paid and type of employment. In Texas, criminal activity before the age of 18 is typically not readily available because, under Family Code, Sec. 58.201 et seq., the criminal records of juveniles who were not serious or habitual offenders are placed on “Automatic Restriction of Access to Records,” which greatly limits accessibility by the majority of individuals and entities. , Additionally, a city is prohibited from using information about juvenile criminal activity in making an employment decision.

The Equal Employment Opportunity Commission (EEOC) takes the position that widespread use of criminal background checks can have a discriminatory impact on minorities that is unrelated to the job or the needs of the employer to protect itself and its customers from an employee with a criminal conviction. So although an employer may be able to look back at least seven years for criminal activity, an employer who is concerned about the EEOC investigating discrimination should only perform a background check on the most recent three or four years, and look for specific kinds of convictions.

Often misdemeanors, and occasionally felonies, are dismissed through deferred adjudication or a similar type of criminal diversion program,. If it was dismissed without an admission of guilt by the applicant, the matter will not show up on a background check. On the other hand, the record of a crime for which an applicant was required to enter a plea of either guilty or nolo contendere (no contest) will be available in a criminal background check. In this regard, a city should word its consent for a criminal background check carefully. If the consent form asks only for prior convictions, it technically applies only to those in which a judge or jury found the applicant guilty and does not include a plea of no contest or even a plea of guilty, a plea being different than a conviction.

Another consideration is whether unemployment benefits apply to an employee whose employment was terminated because he or she was dishonest in the job application about prior criminal activity. If the consent form asks only about convictions, the applicant may exclude prior guilty pleas, no contests, and deferred adjudications. With regard to unemployment benefits, Texas courts have held that doing so is not dishonesty and is not grounds for denying unemployment benefits, for which a reimbursing city will be required to pay. That does not mean that the city is barred from firing the employee for the underlying crime, but should the city then contest the application for unemployment, it will not prevail.

An arrest without a conviction, guilty plea, or plea of no contest is not supposed to show up in a criminal background check but they often do, particularly in Texas. An arrest is not proof of criminal conduct. The rule that a person is innocent until proven guilty applies fully to employment matters. The EEOC prohibits the use of non-conviction arrests in making an employment decision because allowing the practice tends to discriminate against racial and other minorities. While no law in Texas specifically prohibits employers from using arrests as a basis for employment decisions and the anti-discrimination laws do not create an automatic bar against their use, the standard set by those laws is so high it is nearly impossible to justify the use of non-conviction arrest records in employment decisions. Therefore, cities should limit their consideration to actual convictions, guilty pleas and pleas of no contest.

### **Who should conduct the search?**

Cities are free to conduct their own background checks. Many do and there are certain advantages to doing so, particularly because the restrictions in the FCRA that apply to third party background checks do not apply to those conducted by an employer. Nevertheless, a city is well-advised to apply the FCRA requirements (consent, consent on a form separate from the job application, providing the applicant with a copy of the background check) to background checks the city conducts, if for no other reason than to avoid allegations of wrongdoing and possible litigation by claimants willing to challenge the city's position.

More and more services are available online for the conducting of background checks, some more accurate and up to date than others. Many websites offer the "instant" background check, which will search a compilation of databases containing public information for a fee that is significantly cheaper than the cost of a background check vendor. Use of an online service may also give a city the impression that utilizing such a service is the same as conducting a search on the city's own, but online services should be considered the same as third party background checking agencies and therefore subject to the FCRA.

Background check vendors often offer three levels of service:

1. **Basic Investigation:** Searches for residential history, confirmation of birth records, aliases used including maiden and married names, sex offender arrests or convictions, Texas criminal history searches, U.S. Bureau of Prisons searches. May include information about family members or records of persons who live with an applicant.
2. **Moderate Investigation:** The research used in a basic investigation plus federal and nation-wide warrant searches, non-Texas law enforcement checks, civil and criminal cases court searches, federal litigation, and bankruptcy filings.
3. **Advanced Investigation:** Customized according to an employer's request, which may vary widely and may involve security or clearance issues irrelevant to city employment.

No third party agency can guarantee the accuracy of its information and many have incomplete or inaccurate information. The most reliable way to conduct an accurate background check is to go directly through available state, court, and law enforcement agencies.

Police departments often employ criminal background review vendors under contract, and it is common for the agreement to limit the use of the service to law enforcement purposes. A city administrator or personnel department should avoid the temptation to use the police department's vendor for pre-employment screening, even if the police chief is willing to look the other way. The vendor's contract with the police department may state that such use is a breach of the contract and grounds for its termination, or could provide for additional damages or liability.

### **What laws apply to background checks?**

#### **Federal law:**

#### **Fair Credit Reporting Act**

When an employer, landlord or other person or business requests a third party, such as a screening company, to conduct a background check on an individual, the requester and third party must abide by the Fair Credit Reporting Act, 15 USC §1681 et seq., a law that protects consumers and regulates access to consumer information. The FCRA is not limited to consumer reports, which is often a source of confusion. It also governs employment background checks for the purposes of "hiring, promotion, retention, or reassignment." However, it is intended to apply only when an employment background check is prepared by third party, such as an outside screening company, rather than the employer, whether private or governmental.

When a third party compiles the background check, the FCRA requires (1) that the job applicant or employee be notified that an investigation will be performed, (2) that the applicant or employee must give written consent, (3) that the written consent be in a separate document from the job application; and (4) that the applicant or employee be notified if information in the report is used to make an "adverse" employment decision.

The FCRA also contains a restriction on the length of time, measured back from the date of the background check, for which criminal conviction information will be supplied, the basic rule being seven years (but see further discussion below in regard to the EEOC and state law). Section 1681b(b)(2)(A) reads as follows:

(2) Disclosure to consumer.

(A) In general. Except as provided in subparagraph (B), a person may not procure a consumer report, or cause a consumer report to be procured, for employment purposes with respect to any consumer, unless—

(i) a clear and conspicuous disclosure has been made in writing to the consumer at any time before the report is procured or caused to be procured, in a document that consists solely of the disclosure, that a consumer report may be obtained for employment purposes; and

(ii) the consumer has authorized in writing (which authorization may be made on the document referred to in clause (i)) the procurement of the report by that person.

In turn, section 1681b(b)(3)(A) reads as follows:

(3) Conditions for use in adverse actions

(A) In general. Except as provided in subparagraph (B), in using a consumer report for employment purposes, before taking any adverse action based in whole or in part on the report, the person intending to take such adverse action shall provide to the consumer to whom the report relates—

(i) a copy of the report; and

(ii) a description in writing of the rights of the consumer under this title, as prescribed by the Bureau under section 609(c)(3).

Note that subpart (b)(2)(A)(i) requires consent if the background check is to be performed by a third party to be "in a document that consists solely of the disclosure." In other words, unless a city is going to conduct the background check itself, it should be careful and not include the

request for consent in the job application. A separate, stand-alone consent form is necessary. Note further that for third party searches it is not sufficient to just obtain the job applicant's consent. It is also necessary, under subsection (b)(3)(A), "before taking any adverse action based in whole or in part on the report," to provide a copy to the applicant. Adverse action includes failure to hire.

15 U.S.C. § 1681a(h) provides that *[t]he term "employment purposes" when used in connection with a consumer report means a report used for the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee.*

Section 1681c(a)(2) of the FCRA provides that,

Except as authorized under subsection (b) of this section, no consumer reporting agency may make any consumer report containing . . . Civil suits, civil judgments, and records of arrest that from date of entry, antedate the report by more than seven years or until the governing statute of limitations has expired, whichever is the longer period.

Subsection 1681c(b) provides an exception, among others, if the report is in connection with "the employment of any individual at an annual salary which equals, or which may reasonably be expected to equal \$75,000, or more."

The FCRA applies to employees and does not apply to independent contractors. *Phillip C. Lamson v. EMS Energy Marketing Service, Inc.*, 868 F.Supp.2d 804 (E.D. Wis. 2012). That does not mean that a city is prohibited from performing background checks on contractors, but that the requirements for permission, a separate consent form, and disclosure to the applicant discussed above will not apply should a city conduct the search regarding a contractor. Nevertheless, a City should not depend solely on its opinion that an applicant will be a contractor rather than an employee, even if the applicant has agreed in writing that he or she will be a contractor. As well-illustrated in the *Lamson* case, a claimant who is denied or dismissed from employment may make an argument that he or she really was an employee based on state common law. In *Lamson* the plaintiff signed an agreement stating he understood that he would be an independent contractor rather than an employee, but did not hesitate to sue and argue he was actually an employee after being dismissed based on information contained in a subsequent background check.

Tenant background checks follow the same FCRA regulations as those for employers. Many landlords perform their own background checks, and therefore put notification of the screening within the rental application itself. If a third party conducts the screening, the prospective tenant must first provide written permission. If a landlord refuses to rent property based on information in a background report, he must provide an adverse action notice to the person that outlines the reasons.

Prior employment history information is not subject to the FCRA. The Act exempts such communications and both courts and the Federal Trade Commission have confirmed that the Act does not apply to information provided by an applicant's previous employer about the applicant's

job performance. 15 USC §1681a(d)(2)(A)(I); *Owner-Operator Indep. Drivers Ass'n v USIS Commer. Serv.* 537 F3d 1184 (10<sup>th</sup> Cir. 2008), 28 BNA IER Cas 1, 37 ALR Fed 2d 711.

Similarly, criminal convictions are an exception to the FCRA time limits. The FCRA allows criminal convictions to be reported with no time limits. However, Texas follows the seven-year rule with regard to the reporting of criminal convictions, and does not report any that occurred more than seven years since disposition, release or parole. That does not mean that a city is prohibited from considering conviction information more than seven years old, but the information normally will not be available to the employer unless it is volunteered by the applicant.

#### Equal Employment Opportunity Commission regulations

In new guidelines released in April, 2012, the EEOC created questions and controversy with regard to criminal background checks, particularly the time period that may be considered. The EEOC takes the position that widespread use of criminal background checks can have a discriminatory impact on minorities that is unrelated to most jobs or the need of an employer to protect itself from an employee's criminal conviction. So although the law allows an employer to look back seven years or longer for criminal activity, the EEOC recommends that it cover only the most recent three or four years, and that the employer should be concerned only about convictions for activity relevant to the job. That is, the employer should not decline to hire an applicant with a criminal record if the conviction has little or no potential on his or her ability to perform the job well, and in any event the employer should give the applicant an opportunity to explain the circumstances of the criminal offense.

The State of Texas has taken issue with the EEOC's approach. Attorney General Greg Abbott filed suit against the EEOC in November, 2013, in which the State asserts that the EEOC guidance encourages disqualified applicants to file discrimination claims in situations where they are simply not qualified. Whether other states will jump into the fray remains to be seen.

The complaint itself asks the federal court for the following relief:

- A declaratory judgment that the State of Texas and its agencies are entitled to maintain and enforce state laws and policies that absolutely bar convicted felons – or a certain category of convicted felons – from government employment;
- A declaration that the EEOC cannot enforce its guidelines against the State of Texas, and an injunction that bars the EEOC from issuing right-to-sue letters to persons seeking to pursue this type of discrimination charge against the State of Texas or any of its agencies;
- A judgment holding unlawful and setting aside the EEOC's hiring guidelines.

#### Americans with Disabilities Act (ADA)

Texas courts have uniformly held that an employer may require an applicant to undergo drug testing as a condition of employment, provided that the testing reasonably accommodates an employee's basic interest in privacy. However, the Americans with Disabilities Act (ADA), which covers employers with more than 15 employees who work at least 20 calendar weeks per year includes alcoholism and drug addiction (including former drug addiction) as protected disabilities and prohibits alcohol testing at the pre-offer stage of screening applicants. After an offer of employment has been made, alcohol tests are permitted if those tests are required for all



applicants with the same job title. The ADA does not prohibit use of drug testing in making employment decisions and does not protect employees currently using drugs or alcohol.

Both the ADA and the EEOC prohibit genetic examinations or medical inquiries at the initial stage of the hiring process. However, employers may conduct medical examinations after an offer of employment has been made. If an offer is made conditional on the results of a medical exam, the offer must not depend on anything but the results of the medical exam and all entering employees must be subject to the same conditions and examinations. If an employer withdraws an offer of employment based on medical information, it must be able to show that its decision is both job-related and consistent with business necessity. The employer must also be able to show that the individual could not perform the job with reasonable accommodations.

#### Employee Polygraph Protection Act.

Federal law generally restricts the ability of employers to rely on the results of polygraph (lie detector) tests when making employment decisions but provides an exception for government employees. *See* 29 USC 2006(a). Texas law also requires that polygraph tests be administered only by licensed polygraph examiners. Hefty fines for violation of the Act—up to \$10,000—as well as concerns about the reliability of the exams and the burden of their administration limit most city employee polygraph testing to law enforcement officers.

#### Medical information prohibitions

The “Privacy Rule” of the Health Insurance Portability & Accountability Act of 1996 (HIPPA) protects all "individually identifiable health information" held or transmitted by an employer subject to the Act in all forms and media, including electronic, paper, and verbal. Individually identifiable health information is information, including demographic data, that relates to (1) the individual’s past, present or future physical or mental health or condition; (2) the provision of health care to the individual, or (3) the past, present, or future payment for the provision of health care to the individual if it identifies or provides a reasonable basis to identify the individual.

The Privacy Rule is located at 45 CFR Part 160 and Subparts A and E of Part 164. The Privacy Rule excludes from protected health information employment records that an employer maintains in that capacity, as well as certain other records subject to, or defined in, the Family Educational Rights and Privacy Act, 20 U.S.C. §1232g.

#### Department of Transportation regulations related to drug tests

The DOT’s *Procedures for Transportation Workplace Drug and Alcohol Testing Programs*, 49 CFR Part 40, provides the procedures to employers who conduct drug and alcohol tests that are required by DOT agency regulation, which apply to transportation employers, safety-sensitive transportation employees and service agents. Congress has not given employees a private cause of action under the DOT regulations. *See Parry v. Mohawk Motors of Mich., Inc.*, 236 F.3d 299, 308 (6th Cir. 2000); *Drake v. Delta Air Lines, Inc.*, 147 F.3d 169, 170-71 (2d Cir. 1998); *Schmeling v. NORDAM*, 97 F.3d 1336, 1343-44 (10th Cir. 1996); *Abate v. S. Pac. Transp. Co.*, 928 F.2d 167, 169-70 (5th Cir. 1991). However, like the Polygraph Protection Act, the DOT regulations contain specific rules for both administering and disclosing drug test results, and provide significant civil penalties for violation. A comparison of the violations for the Polygraph Protection act and those of the DOT regulations show that the later includes loss of insurance and

designation of an unsatisfactory safety rating in addition to fines. *Mission Petroleum Carriers, Inc. v. Solomon*, 106 S.W.3d 705 (Tex. 2003).

### **State law:**

Among other types of background information, Texas law permits employers to obtain a prospective employee's criminal history which is readily available for a small fee from the Texas Department of Public Safety.

Chapters 20 and 20.5, Business & Commerce Code, contain the same rule as the FCRA in restricting criminal conviction information (arrest, indictment, conviction of a crime, release, or parole) but provides further that the seven year rule does not apply, and that the information may reach back to the applicant or employee's 18<sup>th</sup> birthday, if the job that is under consideration is expected to provide a salary of \$75,000 or more per year.

Chapter 103 of the Texas Labor Code provides employers with some important protections against defamation lawsuits based on job references in connection with background checks by other employers. The law provides that an employer is not required to provide information about a former employer, but if it does so the employer is immune from civil liability for the disclosure or damages proximately caused by it unless the employer knew the information was false at the time it made the disclosure or if the disclosure was made with malice or in reckless disregard for its truth or falsity.

The Texas Legislature afforded employers additional protections during the 2013 legislative session, with the enactment of HB 1188, which amended Chapter 142 of the Civil Practices and Remedies Code to provide that a cause of action may not be brought against an employer solely for negligently hiring or failing to adequately supervise an employee, based on evidence that the employee has been convicted of a crime unless (1) the employer knew or should have known about the conviction or the employee was convicted while performing duties substantially similar to those to be performed in the employment; (2) the employee administered a controlled substance to the victim of the offense in order to facilitate the offense; (3) the employee committed a sexually violent offense; or (4) the offense involved fraud or the misuse of funds or property of a person other than the employer.

Texas Labor Code, Section 21.402, and Texas Insurance Code, Section 546.052, prohibits an employer from requiring a medical examination, other than drug testing, as a prerequisite to an offer of employment, with a few exceptions.

Texas Occupations Code, Sections 58.101--104 provide that a person who possesses genetic information, such as DNA data, for another individual may not disclose it to parties other than the individual or his/her physician unless the disclosure is:

- (1) authorized under a state or federal criminal law relating to:
  - (A) the identification of individuals; or
  - (B) a criminal or juvenile proceeding, an inquest, or a child fatality review by a multidisciplinary child-abuse team;
- (2) required under a specific order of a state or federal court;

- (3) for the purpose of establishing paternity as authorized under a state or federal law;
- (4) made to provide genetic information relating to a decedent and the is made to the blood relatives of the decedent for medical diagnosis;
- (5) made to identify a decedent;
- (6) is for information from a research study in which the procedure for obtaining informed written consent and the use of the information is governed by national standards for protecting participants involved in research projects, including guidelines issued under 21 C.F.R. Part 50 and 45 C.F.R. Part 46;
- (7) the information does not identify a specific individual; or
- (8) the information is provided to the Texas Department of Health to comply with Chapter 87, Health and Safety Code, in connection with birth defects.

A person who discloses genetic information in violation of the Occupations Code provision may be liable for a civil penalty of up to \$10,000. Employers may not discriminate against an applicant or new hire based on that individual's refusal to submit to genetic screening or on the results of such a screening. An employer or insurer that obtains genetic information may not use it to discriminate against an individual with respect to the employer's group health care policy.

Texas Government Code sections 411.0074-.00741 contain the requirements for and allowances for the use of polygraph testing for law enforcement officers and employees of the Department of Public Safety.

A city that owns residential dwellings, acquired perhaps through delinquent tax sales, may need to comply with criminal background check provisions in Chapter 765, Health & Safety Code. Several other Texas laws related to background check are for the purpose of specifying when a background check is required, but do not apply to cities. A non-exclusive list of such statutes is included below as an endnote.<sup>1</sup>

### **Common law and other considerations:**

As discussed further herein, background checks may sometimes be used for, may support evidence of, or may be claimed as being intended for unlawful discrimination. Identity theft or violation of privacy are additional illegal uses of background checks.

### **What about Google, Facebook, Twitter, and other social media?**

The amount of information revealed by simply "googling" a person's name can be startling, and no employment decision restrictions currently apply to the information obtained unless it happens to fall under some other category of legal sensitivity. However, a city that uses Google or a similar search engine to screen job applicants should be careful to verify that the information produced applies to the applicant and not to someone with an identical moniker. Even persons with relatively uncommon names often discover there are others in the world living with the exact same forename and surname, sometimes in a manner with which the job applicant would not want to be identified.

Of greater interest is the fact that thousands of people, particularly but not only young persons, post their daily activities, latest romantic conquests, social accomplishments, degree of recent intoxication, off-color jokes, or entire life stories on Facebook, or will tweet information they would never dream of revealing to a prospective employer. The result is an enormous amount of semi-public information about such persons, some of which a city would not consider as positive for its employees.

Although such information may be password-protected, there is currently no law prohibiting a city from basing an employment decision on such postings. In fact, some employers request that applicants provide passwords so they can review what the applicant or employee has posted. Facebook, in turn, has instituted a rule that members cannot give out their password. The rule has no legal effect on a city or other employer, but it may send a negative message to a prospective employee who is told that he or she should violate the agreement with Facebook in order to be considered for a job. Taking this subject a step further, a city or other employer can require a job applicant or employee to print out everything he or she has posted in the last few years and submit it, without revealing the password, as part of the job application.

#### **What mistakes may be made by a city that creates liability, penalties, or other problems?**

- Failure to conduct a background test for types of employment for which one is required by law.
- Failure to conduct a criminal background check for crimes not exempted under HB 1188.
- Failure to obtain consent before conducting a background check, particularly if a third party is used to perform the review.
- Failure to inform the job applicant of the results of the background check if it is the basis for an employment decision, particularly if a third party performs the review: The purpose of the FCRA rule that the results must be provided to the applicant is to allow that person to dispute it with the background check company. Information provided by such vendors is sometimes notoriously inaccurate.
- Assuming that because the applicant is an independent contractor that the FCRA will not be applicable if, in fact, the test for distinguishing between an employee and a contractor gives rise to questions about the applicant's legal status.
- Basing an employment decision on information about criminal activity that was committed by a job applicant before the age of 18: Even though such information should not be available, it may be communicated in a non-official manner. Nevertheless, a city is prohibited from using information about juvenile criminal activity as the sole basis for making an employment decision.
- Another consideration is whether unemployment benefits apply to an employee whose employment was terminated because he or she was dishonest in the job application about prior criminal activity. If the consent form asks only about convictions, the applicant may exclude

prior guilty pleas, no contests, and deferred adjudications. With regard to unemployment benefits, Texas courts have held that doing so is not dishonesty and is not grounds for denying unemployment benefits, for which a reimbursing city will be required to pay. That does not mean that the city is barred from firing the employee for the underlying crime, but should the city then contest the application for unemployment, it will not prevail.

- Considering an arrest without a conviction, guilty plea, or plea of no contest as the basis for an employment decision, except in clearly authorized situations, particularly if the applicant or employee is a member of an ethnic or racial minority. An arrest is not proof of criminal or offensive conduct (persons are innocent until proven guilty). Although employers should not receive non-conviction arrest information as part of a background check, sometimes the information shows up anyway. No law in Texas specifically prohibits employers from using arrests as a basis for employment decisions but the EEOC asserts federal anti-discrimination law prohibits the use of arrests in employment decisions because such a policy tends to discriminate against ethnic and racial minorities, who are more likely to be arrested than white people. The anti-discrimination laws do not create an automatic bar against the use of arrests but the standard set by those laws is so high it is nearly impossible to justify the use of arrest records in employment decisions. Therefore, employers tend to limit themselves to actual convictions, guilty pleas and pleas of no contest. A job applicant who is a member of an ethnic or racial minority may conclude that he or she was not hired because the city used a background check improperly and may file a charge of discrimination with the EEOC or Texas Workforce Commission (TWC). Although there is very little likelihood that either agency will then require the city to hire the applicant or will impose other remedies, the filing of the charge costs the applicant nothing and requires the city or its liability coverage provider to defend itself against the charges.

- Using criminal activity information that is more than three or four years old as the basis for an employment decision for a member of a racial and ethnic minority may be considered discrimination according to EEOC rules, despite Texas law to the contrary.

- Using the city police department's third party criminal background vendor to conduct pre-employment reviews when the vendor's contract with the police department prohibits doing so.

- Use of a background check in a discriminatory manner to reject applicants who are members of a racial or ethnic minority.

- Use of a background check, perhaps by a city employee rather than for city purposes but for which the city is named as a defendant, for identity theft or in a manner that violates an applicant's right to privacy.

- Making untrue and/or disparaging remarks about a former employee when being interviewed by a prospective employer of that person. Be particularly cautious about doing so if the former employee sued for wrongful termination and the case was settled by written agreement that included an anti-disparaging provision.

## Do's and Don't's According to the Texas Workforce Commission

The Texas state agency that deals with most employment issues, the Texas Workforce Commission, has posted the following tips on "References and Background Checks" online at [http://www.twc.state.tx.us/news/eft/references\\_background\\_checks.html](http://www.twc.state.tx.us/news/eft/references_background_checks.html). The tips are offered for both employers and prior employers who are interviewed about a job applicant

1. The average telephone reference call will not yield much usable information - employers are concerned about being sued for giving unfavorable references.
2. Case in point: *Frank B. Hall Company v. Buck*, 678 S.W.2d 612 (Tex. App.-Houston [14th Dist.] 1984, writ ref'd n.r.e.), cert. denied, 472 U.S. 1009, 105 S. Ct. 2704 (1985) - terminated employee suspected former employer was bad-mouthing him behind the scenes - ex-employee hired private investigator to pose as a prospective new employer and call the former employer for a reference - investigator tape-recorded the employer making scurrilous and unprovable allegations about the ex-employee's character and honesty - jury decided that was defamation and awarded almost \$2,000,000 in total damages to the plaintiff. Note: under Texas law, it is legal for a person to tape-record a conversation without the knowledge or consent of others, as long as the person doing the recording is participating in the conversation.<sup>2</sup>
3. All applicants should sign a waiver and release of liability form clearly authorizing prior employers to release any requested information to your company and relieving both the prior employers and your company of all liability in connection with the release and use of the information. [A sample form is available at the referenced website.]
4. Whatever information an employer releases in connection with a job reference should be factual, in good faith, and non-inflammatory.
5. Similarly, it would be a good idea to restrict the release of information to whatever was requested - unless there is a compelling need to do so, try not to volunteer additional things that are not connected to the information requested by the prospective new employer.
6. Texas law (Texas Labor Code, Chapter 103) gives employers important protections against defamation lawsuits based upon job references, as long as the employer does not knowingly report false information; still, employers should try to report only what can be documented.
7. Employers have the right to do criminal background checks themselves, but most employers hire a service to do that - be careful, since the Fair Credit Reporting Act requires an employer to give written notice that a credit or background check will be done and to get written authorization from an applicant to do the check if an outside agency will be used (the notice and the authorization can be on the same form) - in addition, if the applicant is turned down, the employer must tell the applicant why, give the applicant a copy of the report, and let them know the name and address of the service that furnished the information.
  - a. In-home service and residential delivery companies must perform a complete criminal history background check through DPS or a private vendor on any employees or associates sent by the companies into customers' homes (including attached garages or construction areas next to homes), or else confirm that the persons sent into customers' homes are licensed by an occupational licensing agency that conducted such a criminal history check before issuing the license.

The records must show that during the past 20 years for a felony, and the past 10 years for a class A or B misdemeanor, the person has not been convicted of, or sentenced to deferred adjudication for, an offense against a person or a family, an offense against property, or public indecency. A check done in compliance with these requirements entitles the person's employer to a rebuttable presumption that the employer did not act negligently in hiring the person. See the Texas Civil Practice and Remedies Code, Sections 145.002-145.004. *Recommended:* do such checks on anyone who will be going into a person's home, garage, yards, driveways, or any other areas where the employee could come into contact with people at their homes.

8. With respect to applicants younger than 18, if possible, secure written permission from the child's parent or guardian to conduct background or drug tests.
9. Unless a law requires such a question, do not ask about arrests, since the EEOC and the courts consider that to have a disparate impact on minorities - a company can ask about convictions and pleas of guilty or no contest. If an EEOC claim is filed, the employer must be prepared to show how the criminal record was relevant to the job in question, i.e., the employer must be able to explain the job-relatedness of the offense - see <http://www.eeoc.gov/policy/docs/race-color.html#VIB2conviction> and [http://www.eeoc.gov/policy/docs/arrest\\_records.html](http://www.eeoc.gov/policy/docs/arrest_records.html) for EEOC's position on this.
  - a. Conducting a job-relatedness inquiry involves treating each applicant as an individual - the employer must be able to articulate how it determined, with respect to an individual applicant, in light of the applicant's criminal history, and concerning the job in question, that hiring the person would have involved an unreasonable risk of possible harm to people or property.
10. In Texas, asking only about "convictions" will not turn up some forms of alternative sentencing - for example, under the law of deferred adjudication, if the person given such a sentence satisfies the terms of probation, no final conviction is entered on their record, and the person can legally claim never to have been "convicted" of that offense - however, they would have pled guilty or no contest to the charge (such a plea is necessary in order to qualify for deferred adjudication), so if it is necessary (job-related) to know about convictions and guilty or no contest pleas, the question would have to be rephrased - see the discussion directly above about the job-relatedness of an offense. In the case of *Kellum v. TWC and Danone Waters of North America, Inc.*, 188 S.W.3d 411 (Tex. App.-Dallas 2006), the appeals court ruled that a claimant did not commit disqualifying misconduct by indicating that he had not been convicted of a crime, where the application asked only about convictions, and he had been given deferred adjudication.
  - a. Sample question about criminal history: "During the past (fill in the number) years, have you been convicted of, or have you pled guilty or no contest to, a felony offense? If yes, please explain in the space below. (Answering "yes" to this question will not automatically bar you from employment unless applicable law requires such action.)"
  - b. Try to consider only criminal history that is recent enough to be relevant, given the nature of a particular offense, the nature of the job, and the corresponding level of risk of harm - the remoteness of an offense is a factor in the job-relatedness determination noted above

- c. To minimize the risk of an EEOC claim, and to be as fair as possible, try to keep the following in mind:
    - i. Prior involvement with the criminal justice system should never be used as a blanket disqualifier unless a statute or relevant agency regulation requires such a result.
    - ii. Hiring decisions should be based upon individual characteristics, instead of stereotypes.
    - iii. The best advice for employers in this regard is really to follow the EEOC's guidance on job-relatedness determinations, as explained in this topic and in the last paragraph of the article "Job References and Background Checks" in this book.
    - iv. In general, there is no substitute for treating people as individuals and, to the extent possible, for taking the time to know more about a person than just what official records might show.
11. If an exclusion based on criminal conduct would have a disparate impact on minorities, EEOC expects the employer to develop a "targeted screen" that takes into account the nature and gravity of the crime, how much time has passed since the crime occurred, and the specific functions of the job in question. Any person excluded by such criteria would then have an opportunity for an individualized assessment to determine whether the criteria as applied are job-related and consistent with business necessity. The individualized assessment would involve notice to the individual that the criminal record may result in him or her not being hired, an opportunity for the applicant to explain why the exclusion should not be applied under his or her particular circumstances, and consideration by the employer of whether the individual's new information justifies an exception to the exclusion and shows that the policy is not job-related and consistent with business necessity in the applicant's specific situation. Detailed commentary on the EEOC standards for criminal history information is available at [http://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm](http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm).
12. Be cautious concerning offenses that occurred too far in the past - EEOC's policy statement issued on February 4, 1987 on the use of conviction records in employment decisions cites a 1977 court case as authority for requiring employers to take into account "the nature and gravity of the offense or offenses, the time that has passed since the conviction and/or completion of sentence, and the nature of the job for which the applicant has applied." *Green v. Missouri Pacific Railroad Company*, 549 F.2d 1158, 1160 (8th Cir. 1977). In addition, a Texas statute, Business and Commerce Code Section 20.05, provides that background check companies may not report criminal history information relating to events that happened more than seven years in the past, unless the applicant is to be paid an annual salary of \$75,000 or more, or the applicant will be working for an insurance business.
13. Never ask an applicant to take a polygraph exam unless your organization is statutorily required to do so - that would be a violation of the Employee Polygraph Protection Act of 1988, a federal law.
14. An employer may require an applicant to be responsible for submission of official records, transcripts, certificates, and licenses.



15. Very important: in order to position your company as well as possible against potential "negligent hiring" claims, document your efforts to verify the work history and other background information given by the applicant (*see comment 7(a) above*).
16. Flip side: "negligent referral" - do not ever give a false or misleading reference, even if you think you are insulating yourself from a defamation claim or doing the ex-employee a favor - a Texas employer got hit with a large damage award after giving a false reference on a former employee who had been fired for misconduct.
17. If you have knowledge that an ex-employee has violent tendencies, it is best to be truthful and factual in job references - report only what you can document or prove with firsthand witnesses.
18. HR best practice: if possible, do not ask about criminal history until the tentative offer of employment has been made - that will lower the risk of discrimination based on criminal history for the majority of unsuccessful applicants.

### **Conclusion**

Unfortunately people tend to misrepresent, exaggerate, cover up, and fabricate information in job and other applications, thereby making background checks an essential tool for cities to utilize in hiring employees who can be trusted and who will not expose the city to potential liability. Cities and other governmental entities enjoy significant latitude in their ability to obtain such reviews, and the forgoing is offered to assist cities in avoiding mistakes or inappropriate procedures in the conduct of background checks that may expose the City to other liability.

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<sup>1</sup> *Civil Practice & Remedies Code*, Sec. 145.002. Criminal History Background Check for employees whose duties include entry into another person's residence, an in-home service company or residential delivery; *Education Code*, Sec. 22.0834. Criminal history record information review of certain educational contract employees; *Health & Safety Code*, Sec. 555.021, Required criminal history checks for employees, contractors, and volunteers; *Health & Safety Code*, Sec. 765.001, et seq, Background checks for workers at residential dwelling projects, *Human Resources Code*, Sec. 42.056, [Expires September 1, 2015] Required background and criminal history checks for owners & operator of a child-care facility, child-placing agency, or family home; *Occupations Code*, Sec. 1701.051, Pre-employment request for employment termination report and submission of background check confirmation form for law enforcement agencies; See also, Tex. Health & Safety Code § 765.001, et seq., Tex. Educ. Code § 22.0834

<sup>2</sup> However, Tex. Civ. Prac. & Rem. § 123.001, et seq. provides that it is illegal to use information intercepted during a telephone conversation without the consent of one party to the conversation.